

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 23, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2015AP43-CR
2015AP44-CR**

**Cir. Ct. Nos. 2012CF1462
2012CF1524**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN STEVEN DUEWELL,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Milwaukee County: WILLIAM W. BRASH, Judge. *Affirmed.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 HAGEDORN, J. John Duewell inhaled carburetor cleaner while driving; he was pulled over, arrested, charged, and ultimately pled guilty to two counts of operating a motor vehicle while intoxicated. Afterward, he moved the

circuit court to vacate his convictions, arguing that the term “intoxicant” as used in WIS. STAT. § 346.63(1)(a) (2011-12)¹ did not include the carburetor cleaner he inhaled, but only drinkable alcohol. Duewell argued, and asserts again here on appeal, that his convictions were void because the conduct he was charged with was a nonexistent crime. The circuit court denied the motion and upheld the convictions. We affirm.

Background

¶2 In November 2011, an officer stopped a slow-driving Duewell. The officer observed that his eyes were bloodshot and glossy, and his breath smelled like alcohol and paint thinner. The officer found a spray can of “B-12 Chemtool Carburetor Choke and Throttle Body Cleaner” on the floor of the truck. The officer noted that the cleaner smelled like alcohol and paint thinner—just like Duewell’s breath. According to the officer, Duewell was confused and slow in his movements and performed “poorly” on the field sobriety tests. The officer concluded that Duewell had been inhaling the cleaner and was intoxicated.

¶3 In January 2012—little more than two months later—Duewell was at it again. Another officer saw Duewell in a pickup that was stopped on the roadway. Duewell stumbled as he got out of the truck and proceeded to walk unsteadily around the truck. The officer observed that his pants were wet as if he had urinated in them. Duewell’s speech was slurred and “almost incomprehensible,” and the officer found yet another spray can of the exact same

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

carburetor cleaner² in the truck as well as a chemical-soaked rag in Duewell's pocket. The whole truck smelled like chemicals. Once again, Duewell performed "poorly" on the field sobriety tests. After being arrested Duewell was "unruly" and proceeded to direct profanity at the arresting officers.

¶4 Duewell was charged with two counts of OWI under WIS. STAT. § 346.63(1)(a), which provides:

(1) No person may drive or operate a motor vehicle while:

(a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving.

Id. At the time of Duewell's arrests, the statutes left "intoxicant" undefined.

¶5 Prior to entering his guilty pleas, Duewell moved to dismiss the OWI charges because the methanol contained in the carburetor cleaner was not an "intoxicant" under WIS. STAT. § 346.63(1)(a). However, Duewell withdrew the motion and entered guilty pleas for both counts. After sentencing, Duewell moved to vacate his convictions on the grounds that the carburetor cleaner was not an "intoxicant" under § 346.63(1)(a), meaning no crime was committed. The circuit court denied relief, concluding "that he was operating while intoxicated from a substance which contained alcohol." Duewell appeals this decision.

² As both criminal complaints note, the carburetor cleaner contained alcohol in the form of methanol.

Discussion

¶6 This case presents an issue of statutory interpretation which we review de novo. *State v. Bodoh*, 226 Wis. 2d 718, 724, 595 N.W.2d 330 (1999). When we interpret statutes, we begin with the text. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. If the meaning of the text is clear and unambiguous, then we end our inquiry. *Id.* “Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id.*

¶7 WISCONSIN STAT. § 346.63(1)(a), at the time of the crimes, prohibited driving under the influence of an intoxicant, controlled substance, or controlled substance analog. In both of the OWI cases against Duewell, the State’s theory was that Duewell was under the influence of an “intoxicant”—the carburetor cleaner. The issue, therefore, is the meaning of “intoxicant.” We hold that the plain meaning of the term “intoxicant” includes any substance that intoxicates. Accordingly, Duewell’s convictions under § 346.63(1)(a) stand.

¶8 In 2013, the legislature chose to add a definition for “intoxicant,” and included a “hazardous inhalant,”³ which Duewell agrees would include the cleaner he ingested. The main thrust of Duewell’s argument is that before the legislature adopted this special definition of “intoxicant,” the plain meaning of the

³ See WIS. STAT. § 340.01(25d) (2013-14) (the term “intoxicant” includes “hazardous inhalants”).

term only included drinkable consumable alcohol, not the methanol in the B-12 carburetor cleaner. Duewell raises five arguments in support of his position. First, he contends that the dictionary definitions “establish that the ordinary, accepted and common meaning of ‘intoxicant’—at least when referencing alcohol rather than a drug or other substance—is alcohol contained in an alcoholic beverage or liquor, and not any other type of non-consumable alcohol such as methanol or isopropanol.” Second, he points to the definition of “alcohol” in WIS. STAT. § 346.63(1)(b) as supporting his definition of “intoxicant.” Third, Duewell submits that other statutes defining “intoxicant” show that the legislature intended the word to apply only to drinkable alcohol. Fourth, he points to the standard jury instructions—WIS. JI—CRIMINAL 2663—which refer to “intoxicant” as an alcoholic beverage. Finally, Duewell argues that the statutory change in 2013 defining “intoxicant” to include a “hazardous inhalant” shows that such substances were not considered intoxicants under the prior version of the law.

¶9 The State responds that the plain meaning of the word “intoxicant” includes any substance that has an intoxicating effect, not merely drugs and drinkable alcohol. The State further maintains that Duewell waived this claim because a guilty plea waives all nonjurisdictional defects and that if he is correct on the merits and has not waived this claim, he has breached his plea agreement and is not entitled to the relief he is requesting. We choose to address the merits, assuming without deciding waiver is inapplicable. Because we reject Duewell’s argument that the carburetor cleaner was not an intoxicant, we need not reach the State’s waiver or breach of plea agreement arguments.

¶10 In our view, the plain meaning of “intoxicant” includes any substance that intoxicates, not just drinkable alcohol. Both sides agree, as do we, that where undefined, the common and ordinary meaning of the word controls and

that dictionaries are an appropriate tool to ascertain the meaning. Webster's defines "intoxicant" as "something that intoxicates," or "an intoxicating agent; *esp.* : an alcoholic drink." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1185 (1993). Webster's further defines "intoxicate" to mean "to excite or stupefy by alcoholic drinks or a narcotic ... to the point where physical and mental control is markedly diminished." *Id.* Black's similarly defines "intoxicant" as "[a] substance (*esp.* liquor) that deprives a person of the ordinary use of the senses or of reason." BLACK'S LAW DICTIONARY 950 (10th ed. 2014). Duewell also points to several other similar dictionary definitions of "intoxicant" and "intoxicate."⁴

¶11 Duewell is correct that these definitions reference "liquor" or an "alcoholic drink," but none define "intoxicant" exclusively by reference to drinkable alcohol. Thus, while Duewell rightly observes that drinkable alcohol is the primary cause of intoxication in colloquial usage—as the dictionary definitions confirm—the definitions themselves make clear that one can be intoxicated by things other than consumable alcohol. The focus of the definitions is not on the specific nature of the substance, but rather its effect upon persons using it. Black's Law Dictionary, for example, makes clear that "intoxicant" includes any substance that intoxicates. The phrase "especially alcohol" necessarily means alcohol and other things. If a student states that she "loves summer break, especially July," she is making clear that she loves the whole summer break, not only July.

⁴ Duewell cites the American Heritage Dictionary which defines "intoxicant" as "[a]n agent that intoxicates, especially an alcoholic beverage." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2014). Duewell also directs us to Webster's Unabridged Dictionary and the Oxford Dictionary of English. Webster's Unabridged defines "intoxicant" as "[a]n intoxicating agent, as alcoholic liquor or certain drugs." WEBSTER'S UNABRIDGED DICTIONARY (Deluxe Ed. 2001). Finally, the Oxford Dictionary states that to "intoxicate" is to "cause (someone) to lose control of their faculties or behavior." OXFORD DICTIONARY OF ENGLISH (3d. ed. 2010).

“Especially” does not mean “exclusively.” Duewell’s proffered definition is too narrow; it is simply an incorrect reading of the very definitions he cites. We have no difficulty concluding that the term “intoxicant” includes any substance that impairs the senses or reason, not just alcoholic beverages. Therefore, the plain meaning of “intoxicant” includes the carburetor cleaner Duewell used—which, based on the officers’ observations, had an intoxicating effect on him.

¶12 Duewell attempts to bolster his case by comparing WIS. STAT. § 346.63(1)(a) and (1)(b). Paragraph (1)(a), as we have discussed, prohibits operating a motor vehicle under the influence of an “intoxicant.” Sec. 346.63(1)(a). Paragraph (1)(b) separately prohibits operating a motor vehicle with a “prohibited alcohol concentration,” which is defined to include a broad cross-section of nondrinkable alcohols in addition to alcoholic beverages. WIS. STAT. §§ 346.63(1)(b), 340.01(1q).⁵ Duewell reasons that the legislature’s use of “alcohol” in para. (1)(b), but “intoxicant” in para. (1)(a), shows that the words have different meanings. We agree, but that does not help his case. “Alcohol” is a narrower category than “intoxicant.” Our plain-meaning reading of “intoxicant” yields no conflict or absurd results with the statutorily defined “alcohol” in para. (1)(b).

¶13 Additionally, Duewell urges that because the legislature adopted a more narrow definition of “intoxicant” in WIS. STAT. §§ 350.01(9) and 939.22(42), a similar, narrow definition was intended here. Section 350.01(9), applicable to snowmobile riding, defined “intoxicant” as “any alcohol beverage,

⁵ WISCONSIN STAT. § 340.01 defines words for WIS. STAT. chs. 340-49 and 351. Under § 340.01(1q), “[a]lcohol” means any substance containing any form of alcohol including, but not limited to, ethanol, methanol, propanol and isopropanol.”

controlled substance, controlled substance analog or other drug or any combination thereof.” Section 939.22(42) defined the phrase “[u]nder the influence of an intoxicant” as impairment because of one’s “consumption of an alcohol beverage, of a controlled substance or controlled substance analog ... of any combination of an alcohol beverage, controlled substance and controlled substance analog, or of any other drug or of an alcohol beverage and any other drug.” 2013 Wis. Act 83 subsequently added the term “hazardous inhalant” into both statutes.

¶14 Duewell is correct that closely related statutes may be helpful interpretational aids. *See Kalal*, 271 Wis. 2d 633, ¶46. But they are not determinative. Duewell is correct that these 2011-12 statutory definitions do not explicitly include a hazardous inhalant such as carburetor cleaner. They do, however, explicitly include things other than consumable alcohol—undermining Duewell’s proposed restrictive definition. At best, these definitions cut both ways. We do not see a strong reason to adopt these statutory definitions that the legislature declined to apply to WIS. STAT. § 346.63(1)(a) when the plain, dictionary definition of “intoxicant” includes any substance that intoxicates.

¶15 We are also unpersuaded by Duewell’s argument that WIS JI—CRIMINAL 2663 supports his proffered definition. The instruction defines “under the influence of an intoxicant” to mean the “defendant’s ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.” *Id.* Although the standard jury instructions are designed to be accurate statements of the law,⁶ they are not binding on any court. *State v. Carter*, 2007 WI App 255,

⁶ *See Nommensen v. American Cont’l Ins. Co.*, 2001 WI 112, ¶36, 246 Wis. 2d 132, 629 N.W.2d 301.

¶23 n.13, 306 Wis. 2d 450, 743 N.W.2d 700. Furthermore, circuit courts routinely modify and supplement the standard jury instructions to fit the facts of the case. *See State v. Foster*, 191 Wis. 2d 14, 26-27, 528 N.W.2d 22 (Ct. App. 1995) (“Because the standard instructions are not infallible, it is appropriate for a trial court to modify them when necessary to fully and fairly state the law.”) (citation omitted). The fact that this standard jury instruction references alcoholic beverages is not dispositive regarding whether “intoxicant” may include substances other than alcohol. We think it reflects the fact that the most common form of intoxicant would be an alcoholic beverage, not that the drafters of the instruction determined that drinkable alcoholic beverages are the only form of intoxicant under the statute. Had Duewell’s case gone to trial, the circuit court would have appropriately modified this standard instruction to fit the facts of his intoxication charges.

¶16 Finally, Duewell contends that if the term “intoxicant” included substances other than drinkable alcohols and drugs, then there was no need for the legislature to define the term further to include “hazardous inhalants.” He concludes that such an interpretation would render the relevant portions of the new definition mere surplusage.

¶17 There are, of course, many reasons that the legislature might change a statute or add a new definition. A new statute defining a previously undefined term may or may not reflect a change in the law. We have no way of reading the legislature’s mind, nor need we. While Duewell’s exercise in clairvoyance is plausible, he ignores the obvious possibility that WIS. STAT. § 340.01(25d) (2013-

14) was not a change to the law, but rather the legislature’s attempt to clarify and enshrine what it thought was already the law.⁷

¶18 Duewell’s argument also misunderstands the concept of surplusage. Duewell is not arguing that the circuit court’s interpretation renders the special definition of “intoxicant” meaningless—a result the canon against surplusage is aimed to prevent. *See Kalal*, 271 Wis. 2d 633, ¶46. Rather, he argues that the more specific definition would not have been necessary if the plain meaning already included other alcohols. This presents no problem of surplusage. The language in WIS. STAT. § 340.01(25d) performs the function of defining what an intoxicant is. Thus, the provision is not meaningless at all.

Conclusion

¶19 We conclude the plain meaning of “intoxicant” in WIS. STAT. § 346.63(1)(a) included any substance that has an intoxicating effect—including the carburetor cleaner with which Duewell endangered himself and others. We affirm.

By the Court.—Judgments and orders affirmed.

Not recommended for publication in the official reports.

⁷ The new definition could also be a reaction to our unpublished decision in *Torbeck*, in which we concluded that Difluoroethane (DFE) was not an intoxicant. *State v. Torbeck*, No. 2012AP522, unpublished slip op. ¶8 (WI App Aug. 1, 2012) (holding that DFE is not an “intoxicant” because it was neither a drug nor an alcohol). Defining “intoxicant” to include “hazardous inhalants” directly addresses the DFE at issue in *Torbeck*.

